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IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ex rel SAM DARCY,
Petitioner,

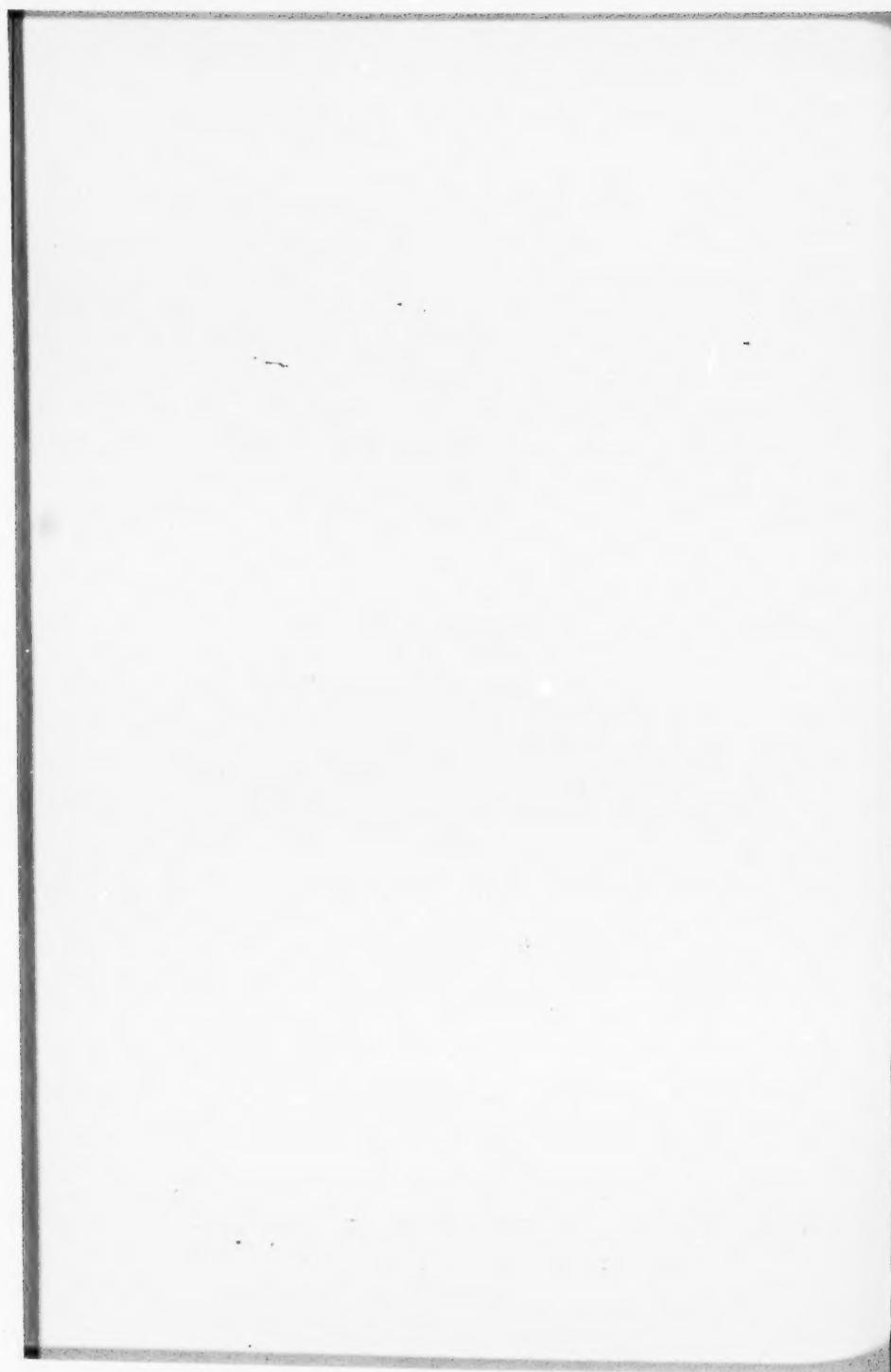
against

SUPERINTENDENT OF COUNTY PRISONS OF PHILADELPHIA, SERGEANT JACOB GOMBORROW, DIRECTOR OF PUBLIC SAFETY JAMES H. MALONE, SUPERINTENDENT OF POLICE EDWARD HUBBS, all of the County of Philadelphia, and JOHN ENGLER, POLICE INSPECTOR OF SAN FRANCISCO, CALIFORNIA,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT**

OSMOND K. FRAENKEL,
FRANCIS FISHER KANE,
LOUIS McCABE,
SAUL C. WALDBAUM,
PHILIP DORFMAN,
1421 Cherry Street,
Philadelphia, Penna.,
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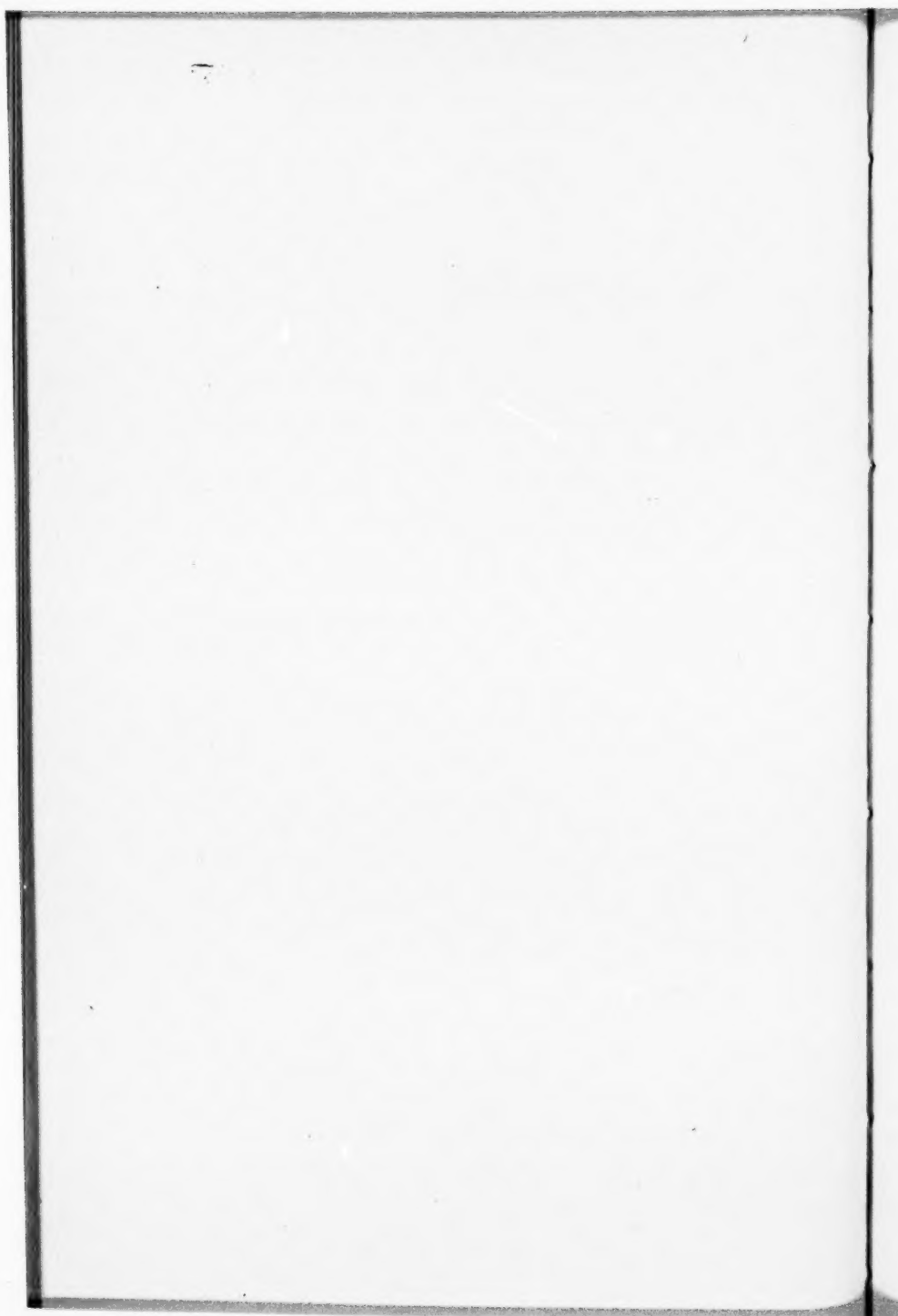
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against

SUPERINTENDENT OF COUNTY PRISONS OF
PHILADELPHIA, SERGEANT JACOB GOMBORROW,
DIRECTOR OF PUBLIC SAFETY JAMES H. MALONE,
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Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT**

*To the Chief Justice of the United States and Associate
Justices of the Supreme Court of the United States:*

Sam Darcy respectfully prays:

That a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Third Circuit affirming an order of the District Court of the United States for the Eastern District of Pennsylvania dismissing a writ of habeas corpus sued out by petitioner to prevent his extradition from the State of Pennsylvania to the State of California.

**SUMMARY STATEMENT OF THE MATTER
INVOLVED**

On or about October 6, 1939 an application was made to the Governor of the State of California for a requisition upon the Governor of the State of Pennsylvania for the arrest and rendition of Samuel Dardeck, alias Sam Darcy, to answer to a charge of perjury (R. 20). Accompanying the application was an affidavit of John A. Engler, a police officer of the City of San Francisco (R. 24-27), from which it appeared that the charge of perjury rested upon a state-

ment made by petitioner on or about March 27, 1934 at the time he registered as a voter (R. 25-26). An extract from the registration record was annexed to the application (R. 28-30). Likewise there was annexed a file concerning petitioner, obtained from the United States Immigration and Naturalization Service in connection with a passport application (R. 31-60).

The charge of perjury was based upon an indictment, accompanying the application for requisition, which indictment repeated the registration statement (R. 61-65). The indictment charged that the registration statement was false in that petitioner gave the name of Sam Darcy instead of the name Samuel Dardeck and that he falsely stated that he was born in New York when in fact he was born in Russia (R. 65).

The crime of perjury is punishable under the Penal Code of California as follows:

“Section 118. Perjury Defined. Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

“Section 126. Punishment of Perjury. Perjury is punishable by imprisonment in the state prison not less than one nor more than fourteen years” (R. 22).

The papers presented for the requisition showed that petitioner had been known by the name Sam Darcy for many years (R. 53) and that he had been a candidate under that name in the State of California for the office of Governor on the Communist ticket in the year 1934 (R. 43). The applica-

tion likewise disclosed that petitioner had obtained United States citizenship through the naturalization of his father in New York in 1921 (R. 45, 46, 49).

The application for requisition having been honored by the Governors of California and Pennsylvania, petitioner sued out a writ of habeas corpus (R. 11). In his petition he alleged the foregoing facts and claimed, that since, as a naturalized citizen, he was entitled to vote under the law of California any misstatement which he may have made with regard to his place of birth was immaterial (R. 5), and that since he had the right under the law of the State of California to assume any name he might desire, the use of the name Darcy was no basis for a prosecution of perjury (R. 6). Petitioner called attention further to the long delay in attempting to extradite him and to the prejudice existing in the State of California against members of the Communist Party (R. 6-8).

The answer, while discussing separately each of the allegations of the petition, in substance, took the position that the question of petitioner's right to use the name Darcy and his qualifications to vote were not before the Court, and that the Court was precluded from going into any of the questions raised because an indictment had been found (R. 14-18).

At the time of argument, the attention of the Court was called to the case of *Pierce v. The Superior Court*, 1 Cal. (2nd) 59, in which case it appeared that an application was filed by the Attorney General of California to strike off more than 24,000 allegedly false registrations in that very year, 1934, and that due inquiry on the part of the appellant failed to reveal or disclose any prosecutions therefor. (R. 100, 101) It was, accordingly, contended that appellant was the object of political persecution and that the consti-

tutional provision regarding rendition was not intended to be used, for such a purpose.

After hearing extensive argument (R. 72-104) the District Court filed an opinion dismissing the writ (R. 105-112). The District Judge, quoting misgivings expressed by Governor Olson of California as to the materiality of the alleged false statements, stated that he shared those misgivings (R. 109). Nevertheless, the Judge felt himself precluded from considering the questions presented, apparently on the theory that he could not go behind the indictment (R. 111).

In the Circuit Court of Appeals a somewhat different view was taken. That Court considered the question whether or not the alleged false statements charged in the indictment were material. It put to one side the question concerning the use of the name Darcy, accepting the argument that the statement in the registration affidavit was not false because petitioner could lawfully use that name (R. 121). The Court then considered the materiality of the statement with regard to the place of birth. It conceded that so far as relator's right to vote was concerned the outcome would have been the same had he told the truth, but concluded that the statement was not immaterial because it made it possible that petitioner might have fraudulently registered a second time and because it prevented the registrar from examining the authenticity of petitioner's proof that he had acquired citizenship through his father (R. 122). The Court refused to inquire into the motives of the prosecution (R. 123).

Application for a rehearing was made on the ground that the Circuit Court of Appeals erred in its argument with regard to materiality (R. 124). This application was denied without opinion (R. 135).

JURISDICTION

It is contended that this Court has jurisdiction under Judicial Code §240 Subdivision "A". The decision of the Circuit Court of Appeals was handed down on April 15, 1940 (R. 118). Petition for rehearing was filed on April 29th (R. 124), within the 15 day period provided for by the rules of the Circuit Court of Appeals for the Third Circuit. It was denied on May 13th, 1940. The application for certiorari is, therefore, timely.

QUESTIONS PRESENTED

1. The case presents the question whether a Federal Court on application for writ of habeas corpus is precluded by the allegations of an indictment from considering the facts set forth in the papers accompanying the application for a requisition for interstate rendition or whether such Court may consider all the facts adduced by the demanding state in order to determine whether or not a crime is substantially charged.

2. The case presents the further question whether or not an indictment for perjury based on a false affidavit in connection with registration for voting charges a crime when it appears that the accused used a name other than the name under which he was born, but which name he had been using for many years and under which he was generally known.

3. The case presents the further question whether or not an indictment for perjury based on a false affidavit in connection with registration for voting charges a crime when it appears that the accused stated that he was a native born citizen when in fact he was a citizen through the naturalization of his father and thus was entitled to vote under the laws of the demanding state.

4. The case presents the further question as to whether or not the Courts of an asylum State in habeas corpus proceedings may inquire into the discriminatory character of the criminal prosecution to determine whether its purpose is that of political persecution and to deny rendition therefor.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

(a) There is here presented for decision an important question of federal law which has not been, but should be, settled by this Court. The extent to which a court on habeas corpus to review application for interstate rendition may consider the facts presented by the demanding state in order to determine whether or not a crime has been charged is of the greatest importance. In view of the doubts expressed by this Court in *Biddinger v. Commissioner*, 245 U. S. 128, it is respectfully submitted that a clear expression by this Court of its opinion on the subject would be of great public benefit and that the questions here presented are of general concern throughout the United States.

Earlier decisions of this Court, hereafter referred to, have not definitely passed on this question with the result

that there have been cases in which State courts and lower Federal courts have reached divergent conclusions, as will be more fully discussed in the brief accompanying this petition.

(b) The Circuit Court of Appeals for the Third Circuit has decided an important question of federal law in a way probably in conflict with the applicable decisions of this Court. This Court has laid down the rule that in interstate rendition it must appear that the person accused is substantially charged with crime. *Roberts v. Reilly*, 116 U. S. 80, 95, reaffirmed in *Appleyard v. Massachusetts*, 203 U. S. 222, 228. This Court has also stated that in such situations the act charged must be an offense under the laws of the demanding state. *Greene v. Henkel*, 183 U. S. 249, 261; *Pierce v. Creecy*, 210 U. S. 387, 481, and *Henry v. Henkel*, 235 U. S. 219. In the case at bar the Circuit Court of Appeals refused to hold that the acts charged against petitioner did not, in the light of the facts appearing from the papers accompanying the requisition, charge him with the crime of perjury under the law of California. This refusal rested upon a contention that the false statement with regard to petitioner's place of birth was material to the affidavit made in connection with registration for voting. Since petitioner was a United States citizen and, therefore, entitled to vote in California, any false statement as to his place of birth was immaterial. *Huston v. Anderson*, 145 Cal. 320; *Attorney General v. Detroit*, 78 Mich. 545; *Cusick's Election*, 136 Pa. 459; *Leavine v. State*, 101 Fla. 1370. The law of California not permitting a conviction for perjury except where the false statement was material, *People v. Schweichler*, 16 Calif. App. 738; *People v. Ah Sing*, 95 Calif. 657; *People v. Jones*, 123 Calif. 299; *People v. Teizerra*, 59 Calif. App. 678; *People v. Macken*, 32 Calif. App. 2nd 31, there is no basis in the case at bar for the

conclusion that petitioner was substantially charged with crime.

(c) Refusal of both the District Court and the Circuit Court of appeals to consider the question of political persecution as a reason for denying rendition in the face of conceded facts contained in a reported decision of the Appellate Court of California, *Pierce v. The Superior Court*, *supra*, in effect, holds that this question may not be considered as a reason for denying rendition and is in conflict with the decision of this Court in *Marbles v. Creecy*, 215 U. S. 63.

Wherefore it is respectfully prayed that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and it is further prayed that the order of the said Circuit Court of Appeals for the Third Circuit affirming the order of the District Court for the Eastern District of Pennsylvania dismissing the writ of habeas corpus herein be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

SAM DARCY,
Petitioner.

OSMOND K. FRAENKEL,
FRANCIS FISHER KANE,
LOUIS F. McCABE,
SAUL C. WALDBAUM,
PHILIP DORFMAN,
Counsel for Petitioner.

State of Pennsylvania,
County of Philadelphia, ss:

Sam Darcy being duly sworn according to law deposes and says that he is the Petitioner herein and that the facts set forth in the within Petition are true and correct.

SAM DARCY.

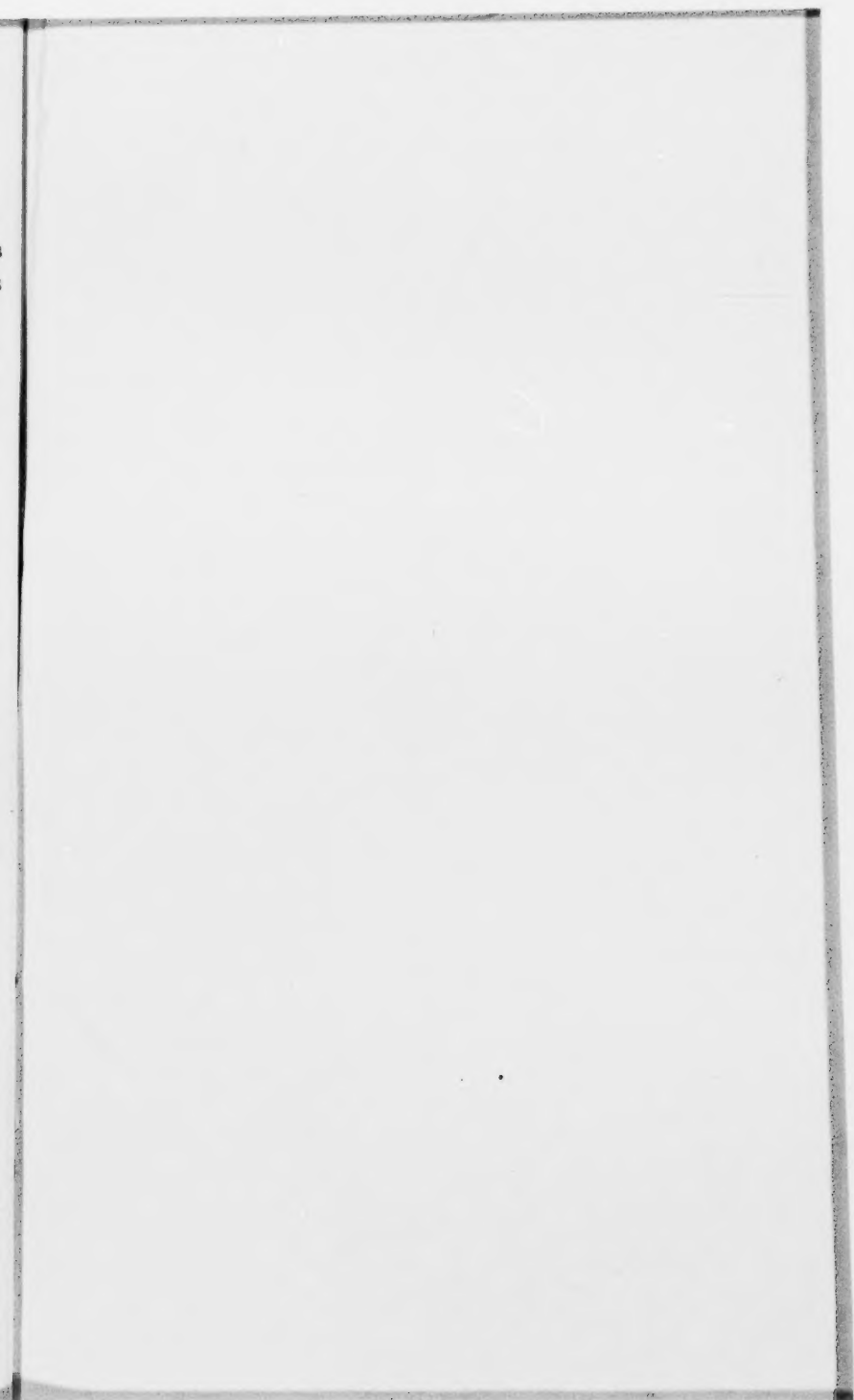
Sworn and subscribed before me this / 2 th day of June, 1940.

GOLDIE LEVIN,
Notary Public.

My commission expires Dec. 2, 1940.

OPINION OF COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Third Circuit handed down on April 16, 1940 has not been officially reported. The opinion appears at page 118 of the record.





BRIEF ACCOMPANYING PETITION FOR WRIT OF CERTIORARI

The facts and issues have been stated in the foregoing petition.

POINT I.

The Questions Involved Are of such Importance and General Interest as to Warrant a Full Consideration of the Same by this Court.

There is presented here the question whether or not a Federal court, on application for writ of habeas corpus, may consider the facts in papers submitted by the demanding state accompanying an indictment in order to determine whether or not, on the basis of those facts, a crime was substantially charged. It is submitted that this question has never been directly considered by this Court. Other courts have reached diverse conclusions on this issue. Thus the Nevada Supreme Court has ruled that all the evidence adduced by the demanding state must be considered in determining whether or not there is substantial evidence that a crime was charged; *In re Kuhns*, 36 Nev. 487; *Ex parte Le Vere* 39 Nev. 214. The Nebraska Supreme Court has held to the contrary and refused to consider anything other than the indictment; *In re Van Sciever*, 42 Neb. 772.

In considering the problem in the case at bar it must be borne in mind that in most of the cases about to be discussed the Court had before it only the indictment. The

attack was generally upon the sufficiency of that indictment alone. No such issue is presented here. In this case petitioner contends that the additional facts adduced by the demanding state clearly show that no crime was in fact committed and that such additional facts, being before the Court on the application for habeas corpus, cannot be disregarded. It is submitted that they must be given the same effect as though incorporated in the indictment itself.

The question of the sufficiency of an indictment in a case of interstate rendition appears first to have been considered by this Court in *Roberts v. Reilly*, 116 U. S. 80, although that was not the issue tendered by the appellant in that case. His chief concern was with the sufficiency of the proof that he was a fugitive from justice; the other objections were all technical in character. Mr. Justice Matthews affirmed the denial of the dismissal of the writ of habeas corpus and reviewed the issues which might be considered on an application for writ of habeas corpus. He said there were two issues:

1. "That the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled * * * and second, that the person demanded is a fugitive * * *".

With regard to the first he said:

"The first of these prerequisites is a question of law and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*."

That declaration has been approved by this Court in *Hyatt v. New York*, 188 U. S. 691, 709; *Munsey v. Clough*, 196 U. S. 364, 372 and *Appleyard v. Massachusetts*, 203

U. S. 222, 228. In the *Hyatt* case the application was made to a State court and there sustained on the ground that the relator was not a fugitive; no other issue was presented. In the *Munsey* case there was merely a technical challenge to an indictment charging forgery; this Court, on the authority of *Ex parte Reggel*, 114 U. S. 642 and *Pearce v. Texas*, 155 U. S. 311, held that such a contention could not be advanced in the removal proceedings. In the *Apple-yard* case the Court was concerned only with the question whether or not appellant was a fugitive from justice. There was not involved in any one of those cases the question whether the facts set forth in the indictment charged a crime under the laws of the demanding state.

Another line of cases decided by this Court points out that there can be no removal on a charge of crime unless the acts set forth constitute an offense. Thus in *Greene v. Henkel*, 183 U. S. 249, Mr. Justice Peckham, in discussing the propriety of removing a defendant from one federal district to another, said at page 261:

“We do not, however, hold that when an indictment charges no offense against the laws of the United States, and the evidence given fails to show any, * * * that the Court would be justified in ordering the removal,* * * ”

This doctrine was approved, as applicable to cases of interstate rendition, in *Pierce v. Creecy*, 210 U. S. 387. In that case various objections were made to an indictment, primarily that the necessary facts were not stated in the indictment with sufficient fullness. Such objections, the Court pointed out, could be availed of only at the trial by demurrer. In considering the force of this decision it should be borne in mind, however, that the demanding state submitted only the indictment, and that no facts

were adduced by the demanding state which negated the charge there made. In discussing the situation there presented Mr. Justice Moody said at page 401:

“There must be objections which reach deeper into the indictment than these which would be good against it in the court where it is pending.”

and at page 402:

“The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the state from which he has fled.”

The same view was taken by this Court in *Henry v. Henkel*, 235 U. S. 219, a federal removal case. There Mr. Justice Lamar said:

“The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute making an offense of the acts charged. In such case the committing court would have no jurisdiction, the prisoner would be in custody without warrant of law and, therefore, entitled to his charge.”

Compare *Morse v. U. S.* 267 U. S. 80, 83.

We are citing these removal cases even though in such situations evidence may be taken to determine the existence of probable causes because the basic point involved, namely, that an offense must be charged, applies equally to rendition cases. Moreover, in the case at bar the demanding state offered evidence outside the indictment which,

we urge, must be considered, together with the statements therein contained. Surely, the right of a court on habeas corpus to determine whether the facts set forth substantially charge the accused with a crime must be the same whether it be a removal or a rendition case. And since such question is one of law it should be determined by the court in habeas corpus proceedings.

In the case at bar petitioner contends that he comes within those cases, since, as will hereafter be shown, the California statute punishes as perjury only false swearing that is material and the facts produced by the demanding state show beyond question that there was no false swearing by petitioner with regard to any material fact.

Respondent in the Court below relied on *Strassheim v. Daily*, 221 U. S. 280; *Biddinger v. Commissioner of Police*, 245 U. S. 128 and *Drew v. Thaw*, 235 U. S. 432 the last of which was quoted from extensively by the Circuit Court of Appeals.

In the *Strassheim* case it was contended that an indictment for obtaining money by false pretenses did not allege a crime under the laws of the demanding state, a contention accepted by the District Court but rejected by Mr. Justice Holmes speaking for a unanimous Supreme Court. The basis of the crime charged was that certain machinery was represented to be new when in fact it was old. The District Court proceeded upon the theory that a guaranty which accompanied the merchandise precluded the possibility of the making of such a representation. Mr. Justice Holmes pointed out that this was a question of fact which could not be determined upon habeas corpus. He held that there was no question that the defendant "was substantially charged with a crime". Petitioner's argument in that case was not that the admitted facts set

forth no crime, which is the argument here, but that an inference of innocence should be drawn from those facts rather than an inference of guilt. The responsibility of drawing inferences, said Mr. Justice Holmes, lay with the State Court at the trial. In the case at bar there is no question of different inferences which might be drawn from conceded facts, but solely a question of law and one, moreover, on which there is no real room for difference of opinion.

In the *Thaw* case the question was whether or not a person could be charged with crime who had been confined to an insane asylum. Again the Court held that that was a question of fact or at most, a doubtful question of New York law which must be resolved by the courts of that state. Mr. Justice Holmes said:

“And even if it be true that the argument stated offers a nice question, it is a question of the law of New York which the New York courts must decide. * * * It is for a New York jury to determine whether, at the moment of the conspiracy, Thaw was insane in such sense as they may be instructed would make the fact a defense.”

Finally, he said that rendition would not be denied when it appeared that the person was a fugitive and the indictment alleged a crime in the demanding state and that there was a “reasonable possibility that it may be such”, merely “upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place.”

In the *Biddinger* case two issues were presented, whether appellant was a fugitive, whether the crime was barred by limitations. Mr. Justice Clarke held that the question of limitations was a defense which must be asserted at the

trial. But it may be pertinent to observe that the facts underlying this claim were set up by appellant and were not contained in the papers submitted by the demanding state. Mr. Justice Clarke expressed some doubt concerning the limitations of a hearing on habeas corpus.

It is not clear whether the doubt there expressed related to the power of the Court to consider the sufficiency of the charge of crime or whether it related to the Court's power to receive evidence offered by the relator. In *People ex rel Gellis v. Sheriff*, 225 App. Div. (N. Y.) 156, 158, the Court appeared to be of the opinion that the power of a court to scrutinize the charge of crime at all had been doubted by this Court in the *Biddinger* case.

Finally, there is *Hogan v. O'Neill*, 255 U. S. 52, in which there was an attack on the sufficiency of the indictment as a pleading. This Court rejected that attack in line with the cases already cited, but added nothing to the discussion of the general nature of court review of extradition. And the latest decision of the Court in this field, *South Carolina v. Bailey*, 289 U. S. 412, involved only the question whether or not the accused person was a fugitive.

This review of the pertinent decisions of this Court indicates that this Court has never had before it the precise problem here presented, namely, whether or not when the demanding state itself adduces facts which contradict a formal allegation in the indictment these facts can be disregarded in determining whether or not a crime has been charged. We submit, therefore, that it is important that this Court take jurisdiction of this case so as to clarify the issue which may have far-reaching implications.

Particularly is this necessary because of the decision of the Court of Appeals for the District of Columbia in *Hard v. Splain*, 45 App. D. C. 1, handed down after the decision

in the *Thaw* case. In the *Hard* case the charge was kidnapping. The indictment alleged that a father had taken his minor child from the custody of the mother. The Appellate Court reversed an order dismissing the writ and directed the discharge of the accused. Considering the law of Michigan, it concluded that under that law a father could not be convicted of kidnapping his own child in the absence of a showing that custody of the child had been given to the mother, a showing which had not been made in the particular case. The decision by this Court in the *Thaw* case was carefully considered and held not controlling, the Court saying:

“Unlike the *Thaw Case*, no question of fact is here involved,—only the question of law, whether, according to the conceded facts, petitioner Hard committed a crime under the laws of Michigan in taking his minor child from the custody of her mother. As we have found the law is one way. The custody not being under decree of court, no crime was committed; hence, the writ should be granted.”

Thus, in spite of intimations of this Court in the *Thaw* case, that “nice” questions should not be decided on habeas corpus in rendition cases, the Court of Appeals of the District of Columbia took upon itself the decision of a question of state law controverted by the state authorities. To what extent a particular question may therefore be considered a “nice” question or one which must be considered by the court in order to determine whether there has been a substantial charge of crime, is not altogether clear from authoritative decisions of this Court. The need for further clarification is thus manifest.

In a number of instances state courts have considered the facts adduced by the demanding state in order to

determine whether or not, under the laws of that state, a crime had been substantially charged. *People ex rel Lawrence v. Brady*, 56 N. Y. 182, and *People ex rel De Martini v. McLaughlin*, 243 N. Y. 417, were cases in which the requisitions were on affidavits, not on indictments. In each instance the Court held that no sufficient details had been set forth. To like effect is *In re Hubbard*, 201 N. C. 472.

In re Kuhns, 36 Nev. 487, and *Ex parte LeVere*, 39 Nev. 214, both involved the charge of desertion of a wife. There, as in the case at bar, each requisition was accompanied by evidentiary material. This material, together with other undisputed facts, showed that no crime could possibly have been committed in the demanding state, since, in each case, the husband had complied with all his marital obligations while he lived in that state. The effect of the decision in each of these cases was that petitioner could not be considered a fugitive from justice because he had not been substantially charged with a crime in the demanding state. To reach that conclusion it was necessary to consider all the evidence before the Court and to interpret the law of the demanding state.

Two other cases have scrutinized the charge contained in the indictment and found it insufficient. In *Ex parte Offutt*, 29 Okl. Cr. 401, the offense charged was forgery, based upon a check signed by the accused as agent for his principals. The Oklahoma Court ruled that no crime of forgery could be predicated upon a check in that form; the writ of habeas corpus was therefore sustained. In *Armstrong v. Van de Vanter*, 21 Wash. 682, a writ was likewise sustained because the indictment included the evidence upon which the charge rested, evidence which clearly showed that no crime had been committed. In that case the charge was inducing a witness to leave the state in a pending judicial

proceeding, the evidence indicated that the court in which the proceeding was alleged to have been pending lacked jurisdiction.

An interesting application of the rule is the recent case of *People v. Butts*, 14 N. Y. S. 2nd 881, where a minor was released on habeas corpus because, under the laws of the demanding state, he could not be charged with crime for the offense committed, but only as a juvenile offender.

We believe that these various decisions of state courts are as important as those of inferior federal courts, since the subject of interstate rendition is governed by the Constitution of the United States and thus is solely a federal question. The accused has his choice whether to apply to a state or federal judge for the writ of habeas corpus. Whatever the decision may be, ultimate review by this Court is proper. Therefore, we believe that the law as developed in the various states must be taken into account by this Court in order to determine whether there is need for further clarification of the subject.

We believe that the various interpretations which have been given to the decisions of this Court by various state and federal courts fully justify the present application for review, regardless of the further contention made by petitioner that the decision of the Circuit Court of Appeals in the instant case was erroneous, a consideration which we will now discuss.

POINT II.

The Papers Submitted Show that Petitioner Has Not Been Substantially Charged with a Crime.

The crime charged was perjury. The statute of California (Penal Code Sec. 118) punishes as a perjurer a person who

states "as true any material matter which he knows to be false."

It is well settled by California law that there can be no conviction under this statute unless the matter charged to have been falsely stated was material to the issue presented. See *People v. McDermott*, 8 Calif. 288; *People v. Ah Sing*, 95 Calif. 657; *People v. Perazzo*, 64 Calif. 106. Among recent applications of the same rule are: *People v. Planer*, 23 Calif. App. 2nd 251 and *People v. Macken*, 32 Calif. App. 2nd 31.

A conviction for perjury in a situation similar to the case at bar was reversed in *People v. Schweichler*, 16 Calif. App. 738. In that case it was charged, as here, that defendant had made a false statement as to his qualifications to register. Upon challenge of his right to vote he testified falsely with regard to his previous employment. A conviction based upon this false testimony was reversed on the ground that the false statement was not material to his right to vote.

The right to vote in California is dependent upon the State Constitution. This provides (Art. II §1) that every person over the age of 21, who has been a resident of the state for one year, of the county for ninety days and of the election precinct for forty days, and who is a citizen of the United States shall be entitled to vote. Section 1096 of the Political Code sets forth registration qualifications including the making of an affidavit of registration such as was made in the case at bar and which forms the basis of the charge of perjury.

The effect of this law was considered by the Supreme Court of California in *Huston v. Anderson*, 145 Calif. 320. The Court there held that a person who was in fact entitled to vote would not be deemed an illegal voter simply

because there was some irregularity or informality in the method by which he was registered. To the same effect are: *Attorney General v. Detroit*, 78 Mich. 545; *Cusick's Election*, 136 Pa. 459.

A case like the one at bar is *Leavine v. The State*, 101 Fla. 1370. Defendant was charged with having falsely sworn that he was a qualified elector of a particular precinct; it was conceded that he was a qualified elector of the county. The election was a general one in which residence in a particular precinct was not of importance. The State Supreme Court, therefore, reversed a conviction on the ground that defendant having been a qualified voter in the county it was of no consequence that he may not have been a qualified voter in the particular precinct.

In the Court below Judge Maris in effect conceded that the misstatement as to place of birth (the only false statement considered by the Court) was immaterial insofar as concerned petitioner's right to vote. He said, however, that it was not immaterial for all purposes, suggesting a number of possible grounds for that conclusion. He said that the registrar of voters was entitled to any information which would enable him to purge the list of those not entitled to vote. Since, however, petitioner was entitled to vote his name could not properly have been stricken from the list, regardless of the precise place of his birth.

Judge Maris suggested that the registrar was prevented by the misstatement from determining whether or not the same person might have registered twice. There is no rational basis for such a contention. Whether or not a particular statement at the time of first registration was true or false would in no way enable the registrar to check a possible second registration. Obviously, a person who intended to register twice would give different statements

both times. It does not follow, however, that giving a false statement originally would make it any easier to register a second time than if he had given a true statement the first time. Had petitioner given a completely true statement the first time he could just as easily have registered a second time. In the Circuit Court it was suggested that:

“Let us suppose that the relator, having been listed as Darcy, a native born citizen, had then obtained a second listing as Dardeck, a native of the Ukraine, who had derived his rights of citizenship through his father. The Registrar would thereby have been deprived of information to which he was entitled to enable him to determine whether the same person had registered twice. Or let us suppose some person (other than the relator), not entitled to vote in his own right, was permitted to register as Dardeck, a native of the Ukraine, Russia. A fraudulent registration was thereby made possible by reason of the relator’s misstatement.”

The fallacy of the foregoing argument is manifest when it is considered that the same argument could have been made had petitioner properly registered in the first place. Then the opinion of the Court would have read:

“Let us suppose that the relator, having been listed as Dardeck, a native of the Ukraine, who had derived his rights of citizenship through his father, had then obtained a second listing as Darcy, a native born citizen. The Registrar would thereby have been deprived of information to which he was entitled to enable him to determine whether the same person had registered twice. Or let us suppose some person (other than the relator), not entitled to vote in his own right, was permitted to register as Darcy, a native born citizen. A

fraudulent registration was thereby made possible by reason of the relator's misstatement."

It thus becomes clear that the possibility of a second false registration is in no way dependent upon the truth or falsity of petitioner's statement as to his place of birth or even as to his name—although the Circuit Court appears to have ruled that no charge of perjury could be based upon the use of a name other than the one under which petitioner was born. This latter conclusion was, it appears to us, inevitable in view of the fact that under the law of California a person may adopt a name without judicial proceedings (*Emery v. Kipp*, 154 Calif. 83) and in view of the fact that the papers submitted by the demanding state show that petitioner was well known under the name of Darcy, the name used (R. 51, 53), and that he had been a candidate in California for the office of Governor under that name (R. 35-39).

To hold, therefore, that the false statement with regard to place of birth was material to the registration would impose criminal liability not because of any actual wrong done by the accused but because of the possibility that the accused or someone else might do wrong at some other time. Such a principle is abhorrent to every concept of our criminal law.

Finally, it is suggested in the opinion of the Circuit Court that the misstatement was material because it prevented the registrar from examining the authenticity of the documents relied upon to establish citizenship. This argument is wholly fallacious because there was nothing done to prevent the registrar from demanding proof of the claimed citizenship and because the registrar could have demanded the presentation of documents proving the asserted native birth. There is no reason to suppose that presentation of docu-

ments is necessary in the one case any more than it is in the other, nor that the registration statutes were more concerned with information from naturalized than from native born citizens. Indeed the contrary may be inferred from the fact that the California statute (Political Code §1097-a (c)) expressly provided that a person claiming citizenship by derivation could qualify by making an affidavit to that effect—the presentation of documents is not required. Moreover, in view of the fact that petitioner's right to vote is not disputed, inquiry by the registrar would only have had the result of clearing the record. Petitioner would have been able to produce his derivative papers and any irregularity in the registration statement could have been corrected. Thus this case would never have arisen.

The same argument applies to the suggestion by the Court below that petitioner's false statement with regard to his birth prevented the registrar from purging the lists of all those not entitled to vote. Since it is conceded that petitioner was entitled to vote, no such result could have followed.

Essentially, the contentions advanced by respondent and accepted by both of the lower courts come to this, that a person can be convicted for perjury though the false statements attributed to him were of no importance whatever in connection with the only purpose for which the statement was made, namely, the establishment of the right to vote, and where no harm resulted to anyone because of the false statement. Such is not the law in California or anywhere else.

Petitioner does not mean to suggest that a state does not have the right to punish the making of a false statement in connection with a registration affidavit, even though that statement might not be material and so of a character

sufficient to form the basis of the crime of perjury. Many states have statutes which create the crime of false swearing for the making of untrue statements under circumstances not amounting to perjury. And states also have statutes punishing the making of false statements in connection with various kinds of registration laws. The fact that California may not have had a law of either character is no justification for attempting to prosecute petitioner under a law which does not apply to the facts of the case.

It is clear, however, that since the false statements relied upon had no bearing whatever upon petitioner's right to vote and since the sole purpose of the registration statutes is to provide machinery to restrict the voting privilege to those entitled to it and since the crime of perjury cannot be committed unless the false statement is material to the purpose in connection with which the statement was made, no crime was in fact charged against this petitioner on the basis of the facts produced by the demanding state.

POINT III.

Interstate Rendition Should Not Be Allowed To Aid Political Persecution.

As indicated in the foregoing Petition, both the District Court and the Circuit Court of Appeals felt that any matters involving political persecution should not be considered since the motive for the institution of a prosecution is immaterial.

We submit that the decision in this regard is contrary to the views expressed in this Court in *Marbles v. Creecy*, 215 U. S. 63, in which case, although the proof was insufficient to establish that the fugitive would not be justly dealt with, this Court indicated, nevertheless, that such a reason, if

capable of proof, would be sufficient to warrant a denial of rendition.

Since the discriminatory character of the prosecution in this case is clearly established by the number of other violations which were not prosecuted at the same time in California as set forth in *Pierce v. The Superior Court*, *supra*, it is submitted that the question should have been considered by the Circuit Court of Appeals. Otherwise, the processes of rendition would be distorted into the punishment of manufactured crime dictatorially against a member of a helpless political minority, (*Chambers v. Florida*, 309 U. S.—).

Conclusion

It is respectfully submitted that serious questions of federal law are presented for review by this Court, that federal and state courts have differed concerning the application of earlier decisions of this Court in like situations, and that the decision of the Circuit Court of Appeals for the Third Circuit sought to be reviewed is in conflict with the applicable decisions of this Court and the applicable principles of federal law. The petition for certiorari should be granted.

Respectfully submitted,

OSMOND K. FRAENKEL,

PHILIP DORFMAN,

Counsel for Petitioner.



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PAID

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CLERK

No. 154

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, *EX REL* SAM DARCY,
Petitioner,

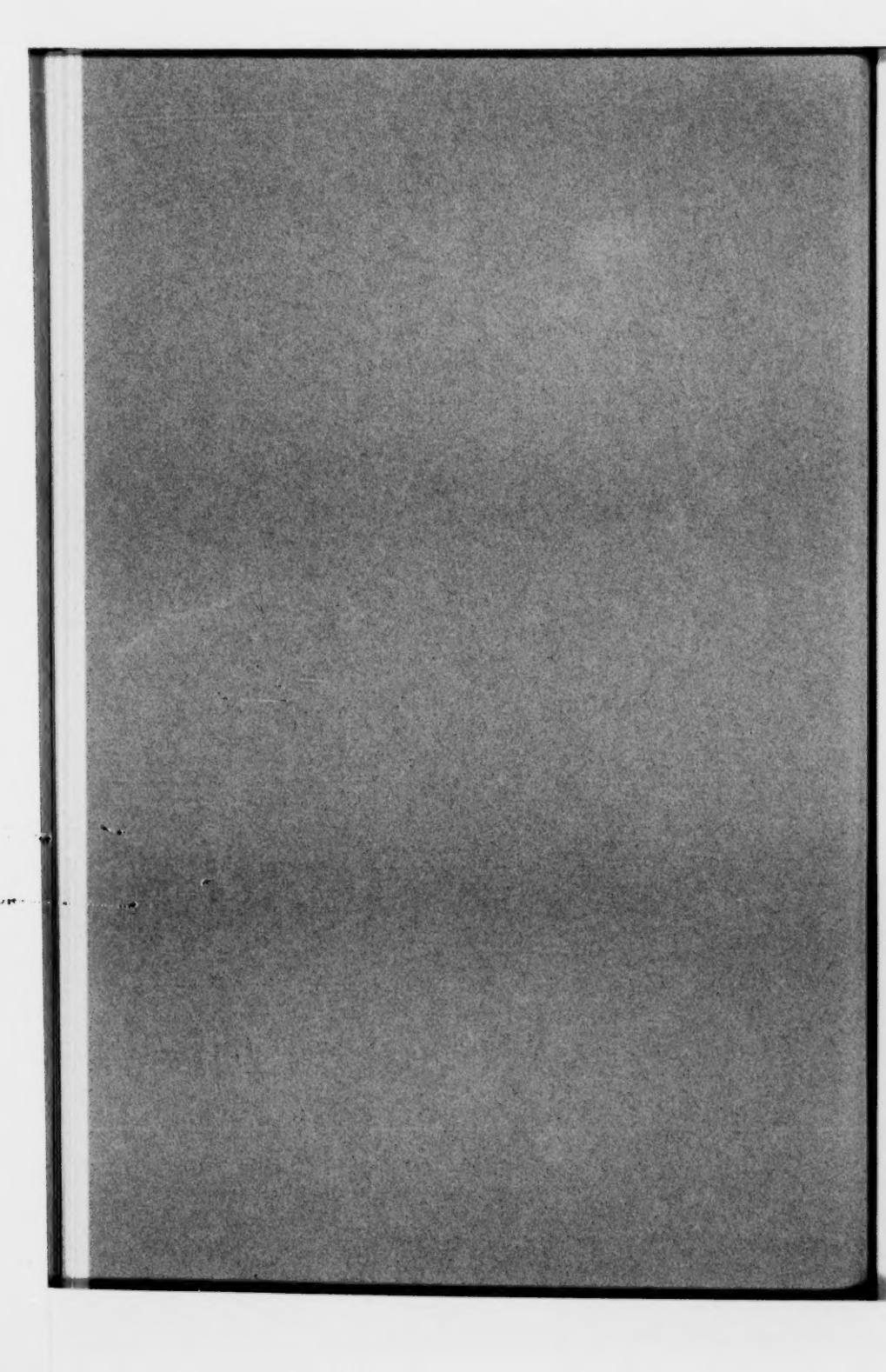
against

SUPERINTENDENT OF COUNTY PRISONS OF
PHILADELPHIA, SERGEANT GOMBORROW,
DIRECTOR OF PUBLIC SAFETY JAMES H. MA-
LONE, SUPERINTENDENT OF POLICE ED-
WARD HUBBS, all of the County of Philadelphia,
and JOHN ENGLER, POLICE INSPECTOR OF
SAN FRANCISCO, CALIFORNIA,

Respondents.

**ANSWER TO PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

CHARLES F. KELLEY,
District Attorney of
Philadelphia County,
666 City Hall,
Philadelphia, Pa.



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COUNTER-SUMMARY STATEMENT OF MATTER INVOLVED.

On the 6th day of December, A. D. 1935, a grand jury in and for the city and county of San Francisco, Calif., found a true bill of indictment against Samuel Dardeck, alias Sam Darcy, charging him with perjury in that on March 27, 1934, when he registered in order to vote in the city and county of San Francisco, State of California, he swore that his full name was Sam Darcy, that he was born in New York (meaning New York City, State of New York), whereas in truth and fact his name is Samuel Dardeck and he was born in the Ukraine, Russia.

The Governor of California requested of the Governor of Pennsylvania extradition of the defendant in order that he might be tried on said indictment; which request after a hearing granted by the Governor of Pennsylvania at Harrisburg was granted and the extradition warrant signed by the Governor of Pennsylvania on November 2, 1939.

On November 3, 1939, the defendant was taken into custody at Philadelphia, Pennsylvania, on said warrant of the Governor of Pennsylvania and the same day by his counsel filed a petition for a writ of habeas corpus wherein is set forth—

A. He has used the name Sam Darcy since 1921.

B. Under the law of California, the defendant had the right to assume a name other than that which he bore at birth without resort to legal proceedings.

C. He was naturalized an American citizen in 1921 while a minor through derivation from his father and therefore at the time of registering, March 27, 1934, was a citizen of the United States.

D. He remained in California until June of 1935.

E. In December of 1937, he moved to quash this indictment by an attorney of San Francisco, California, but such a motion could not be entertained in his absence.

F. He has been prevented from testing the legality of the indictment.

G. These proceedings were initiated by one Edward Francis Sullivan in June, 1939. Who Sullivan is, his address and what connection he had with the case is not set forth, nor proved.

H. Governor Olsen of the State of California is supposed, according to an alleged quotation from a San Francisco newspaper, to have questioned the materiality of the false statements made in the registration application; of which there is no proof.

I. He was the titular head of the Communist party in California and is now a State Secretary of the Communist party in Pennsylvania; of which there is no proof.

J. While he was in California, he was arrested on spurious charges, beaten in jail, and other offenses; of which there is no proof.

K. No crime was committed and the purity of the ballot box not violated; of which there is no proof.

L. He cannot secure a fair trial in California and particularly in San Francisco; of which there is no proof.

M. The Governor of Pennsylvania had no authority to issue the warrant for extradition because:

1. A crime is not charged.

2. The proceedings were instituted, not for the purpose of punishing him for a crime, but for political purposes and he cannot secure a fair trial in San Francisco; of which there is no proof.

The answer to the petition was filed (Record, page 14) in which all the material allegations are denied.

Attached to the requisition papers is an examination of the defendant made by the Immigration Authorities at New York on July 1, 1938, wherein (Record, page 53) he stated as follows:

“Q. Then you are principally known by the name of Darcy, is that correct?

A. I am known by both names. All my life that I have been going to school and work I have used the name of Dardeck.

Q. What do you consider to be your legal name?

A. I don't know.”

The defendant has a brother Charles, apparently four years his senior, who at one time testified before the Immigration Authorities that he identified the picture of the defendant, Samuel Dardeck, as Israel Dardeck and knew of no brother by the name of Samuel (Record, pages 54-55).

A passport was issued to the defendant May 18, 1927, by the Department of State of the United States in which the defendant stated his name to be Samuel Adams Dardeck and that he was married to one Emma Blechschmidt Dardeck (nee Blechschmidt) who was born at North Bergen, N. J., June 13, 1903, and to whom he was married on May 13, 1927 (Record, page 33). In the later examination of the defendant, it appears (Record, page 51) that under the name of Samuel Adams Darcy he was married in New York in 1926 to Emma Pauline Blechschmidt, born June 13, 1903, at 22 Browning Street, North Bergen, N. J., whose father was Richard Blechschmidt, mother Wilhel-

mina Hill, and that having learned that said marriage was invalid, he remarried said Emma Pauline Blechschmidt on May 13, 1927, at Chicago, Illinois. It further appears (Record, page 56) that a passport was issued by the State Department of the United States on March 10, 1928, to one Albert Feierabend of New York City and his wife, Emma Pauline Blechschmidt, born in North Bergen, N. J., on June 13, 1903, to whom he was married on March 21, 1928, at New York City, and it is therein stated that Emma Pauline Blechschmidt had never before been married. The defendant denied any knowledge of Feierabend or the person to whom he was married, although the place, date of birth and names of the wives are identical.

On June 11, 1934, the defendant swore to a declaration for himself as candidate for Governor of the State of California on the Communist party ticket wherein he stated that he had resided in California $8\frac{1}{2}$ years, that he had been a citizen of the United States for 34 years and that he was a candidate for election at the primary election to be held on the 28th day of August, 1934 (Record, page 35).

It appears from the Record, page 45, that the defendant was apparently born November 6, 1904 or 1905, in Russia and that he arrived in the United States on December 7, 1909, or October 16, 1911 (Record, pages 45-46). When a passport was issued to him by the State Department of the United States on May 18, 1927, (Record, page 32) he stated that he had resided continuously in the United States from 1909 to 1927 at New York City, New York, and Chicago, Ill., and that his permanent residence was 2 East St., Jersey City, N. J., and it further appears (Record, page 57) that during the whole of 1928 he was not in the United States and (Record, page 50) having left the United States in May, 1927, on the SS Reliance and returned on the NYK line at the beginning of July, 1929, arriving at San Francisco from Japan. He could not, therefore, have been a resident of California $8\frac{1}{2}$ years nor 34 years of age.

The Record in this case discloses the above facts from exhibits which appear with the extradition papers. No testimony was taken as to the petition for the writ of habeas corpus and the answer thereto. The petition for the writ of habeas corpus admits that the defendant swore his name was Sam Darcy and not Samuel Dardeck. The petition admits that he swore he was born in the United States whereas in truth he was born in Russia. The petition admits that he registered and swore to the affidavit on March 27, 1934. The petition admits that the defendant was in California March 27, 1934 and continued to remain there until June of 1935. The writ of habeas corpus was dismissed November 30, 1939, by the United States District Court (Record, page 113). An appeal was taken to the United States Circuit Court for the Third Circuit and in an opinion filed April 15, 1940, the order of the District Court was affirmed. A petition for a reargument in the Circuit Court of Appeals for the Third Circuit was refused.

COUNTER STATEMENT OF QUESTIONS INVOLVED.

Does the indictment charge the defendant with a crime, to wit, perjury? (Affirmed by the District Court and Circuit Court.)

Is the relator the person named in the indictment found by the Grand Jury for the City and County of San Francisco, State of California, and ordered to be turned over to the agent of said state for return to the state of California? (Admitted by the relator and affirmed by the District Court and Circuit Court.)

Was the relator in California at the time the crime was committed? (Admitted by the relator and affirmed by the District Court and Circuit Court.)

ARGUMENT.

The indictment sets forth a charge of perjury under the law of California committed by the relator. Whether upon a trial of this indictment the defendant be convicted or not is of no moment as far as the present proceedings are concerned. A writ of habeas corpus is not a writ of error nor a motion to quash, it is merely to inquire into the existence of probable cause and the regularity of imprisonment. The argument for the relator states that they do not attack the indictment because of technical defects but that they urge that the indictment does not charge the defendant with committing a crime.

The indictment charges (Record, page 63), "and the said Samuel Dardeck, alias Sam Darcy, then and there after being so sworn as aforesaid, did willfully, knowingly, corruptly, falsely and feloniously, swear and take oath to the truth of all the answers and statement contained in the aforesaid affidavit, which affidavit is quoted herewith haec verba as follows, to wit" (setting forth the registration affidavit in full).

(Record, page 65) "Whereas in truth and in fact, and as he, the said Samuel Dardeck, alias Sam Darcy, then and there at the time of taking said oath and swearing to the truth of all of the answers and statements contained in said affidavit as aforesaid well knew that the name of him, the said Samuel Dardeck, alias Sam Darcy, was not Sam Darcy but was Samuel Dardeck, and that he, the said Samuel Dardeck, alias Sam Darcy, was not born in New York, but was born in the Ukraine in Russia."

These quotations from the indictment charge perjury as defined in the Penal Code of the State of California (Record, page 22):

"Section 118. PERJURY DEFINED. Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent

tribunal, officer, or person in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

Record, page 51, shows that the relator married under the name of Samuel Adams Darcy in Manhattan in 1926 but being informed that this was improper he was remarried at Chicago, Ill., May 13, 1927, under the name of Samuel Adams Dardeck. The relator stated (Record, page 52) July 1, 1935, when applying for a passport that he had not registered as being born in New York. "The fact is that I was not born there so why should I register that way."

As we read the argument for the relator appellant, it is, that under the law of California he was entitled to be registered to vote and that under the law of California he was entitled to vote, being and according to the argument entitled to vote in California it is immaterial whether a voter gives his right name or not, or whether he tells truthfully how or under what circumstances he became a citizen. The law of California provided that the relator when he requested to be registered as a voter should be sworn and answer truthfully certain questions. These he admits he answered untruthfully as far as his name is concerned and as to the place of his birth and as to how he became an American citizen.

If we concede for the sake of argument alone that the relator was entitled to be registered and entitled to vote in California, nevertheless the law of California provided that certain questions should be answered in an affidavit sworn to by the applicant for registration. In order to maintain the purity of the ballot, it is certainly material that it be known definitely the correct name of the voter and the fact of whether or not he is a citizen by birth or naturalization. The application which he signed and swore

to alleges that his name is Sam Darcy and that he was born in the United States. That gave him the right to vote as Sam Darcy, a citizen of the United States by birth. There was nothing to then prevent him from registering from another address as Samuel Dardeck, born in the Ukraine and naturalized by reason of his father's naturalization during minority. There is no similarity of name and no similarity as to how the voter became a citizen.

A person's right to vote may be challenged. The possibility of challenge might be avoided by the mere allegation that one was a citizen by birth, whereas a citizen by naturalization might have to produce additional evidence other than his mere statement to show his right to be registered as a voter and to vote, so that irrespective of what may be the outcome of this case upon a trial, the allegation of perjury under the laws of California is warranted and the requisition was rightfully granted, and the defendant should be turned over to the agent for the State of California to be taken there for trial.

The whole of the argument on behalf of the relator is based on the fact that this Court should determine that the crime of perjury has not been alleged. In other words, that the defendant has not been substantially charged with a crime which is that he has not been in substance charged with a crime, which is contrary to the facts in this case; and secondly, that this Court should determine as a matter of law that he was qualified to vote in California and that his registration under a fictitious name and giving a false statement as to his place of birth and citizenship did not prevent him from voting and could not be perjury under the laws of California. The relator admits that he is the person named in the indictment; that he swore that his name was Sam Darcy and that he was born in New York, United States of America, and admits that those allegations are false.

We can find no case where under similar circumstances

a Court ever refused requisition, and we herewith refer your Honors to the following cases:

Appleyard vs. Massachusetts, 203 U. S. 222.

Appleyard was indicted in New York State for grand larceny, and requisition was made to the Governor of Massachusetts and granted. The indictment was for crime against the laws of the State of New York.

p. "A person charged by indictment or by affidavit
227 before a magistrate with the commission within a

State of a crime covered by its laws, and who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any State. The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States—an object of the first concern to the people of the entire country, and which each State is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the States. And while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities

of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State."

"It must appear, therefore, to the Governor of the State to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the Governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus. The second is a question of fact, which the Governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof. *Ex parte Reggel*, 114 U. S. 642."

Strassheim vs. Daily, 221 U. S. 280.

Daily was indicted for obtaining money under false

pretenses in Michigan, and arrested in Illinois. The false pretense was that he had contracted to sell new machinery and in fact sold second-hand machinery, and on a writ of habeas corpus the Court discharged him on the ground that the contract provided certain things which according to the lower court on the hearing of the writ of habeas corpus did not constitute a crime.

p. "We sum up the count thus broadly, because, although
282 considerable ingenuity was spent in pointing out defects that would occur to no one outside of the criminal law, yet whatever may be thought of the criticisms in Michigan, it is plain that the count shows that the defendant 'was substantially charged with a crime,' and upon habeas corpus in extradition proceedings, that is enough. *Pierce v. Creecy*, 210 U. S. 387, 405."

Pierce v. Creecy, 210 U. S. 387:

p. "The counsel for the petitioner disclaim the purpose
401 of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not whether the indictment is good enough, over seasonable challenge, to bring the accused to the bar for trial. Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear. But it will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of crime for reasons that are apt only to destroy its validity as a criminal pleading. There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending. We are unable to adopt the test suggested by counsel, that an objection, good if taken on arrest of judgment, would be sufficient to

show that the indictment is not a charge of crime. Not to speak of the uncertainty of such a test, in view of the varying practice in the different States, there is nothing in principle or authority which supports it. Of course, such a test would be utterly inapplicable to cases of a charge of crime by affidavit, which was held to be within the Constitution. In the *Matter of Strauss*, 197 U. S. 324. The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled.

Roberts v. Reilly, 116 U. S. 80, 95;
Pearce v. Texas, 155 U. S. 311, 313;
Hyatt v. Corkran, 188 U. S. 691, 709;
Munsey v. Clough, 196 U. S. 364, 372;
Davise's Case, 122 Massachusetts, 324;
State v. O'Connor, 38 Minnesota, 243;
State v. Goss, 66 Minnesota, 291;
Matter of Voorhees, 32 N. J. L. 141;
Ex parte Pearce, 32 Tex. Crim. 301;
In re Van Sciever, 42 Nebraska, 772;
State v. Clough, 71 N. H. 594."

"Before proceeding further, it is well to set forth all the objections to the indictment made by counsel, in order to see whether, if any one of them is well founded, it shows that there was no charge of crime against the petitioner. For if all criticisms of the indictment should be approved, and they leave untouched in the pleading enough to show that the petitioner was charged with crime in the broad and practical sense in which those words ought to be understood, the condition prescribed by the Constitution has been performed."

"The objections to the indictment which were advanced in the argument are six in number:

1. The statements in respect to which false swearing is alleged are not statements of facts but of opinion, and therefore, however, falsely made, cannot amount to the crime of false swearing.

2. The assignments of falsity are insufficient, for no facts are alleged which are necessarily inconsistent with the alleged false affidavit.

3. The charge is not alleged with the certainty required in an indictment.

4. Upon the face of the indictment the prosecution is barred by the statute of limitations.

5. The indictment discloses the fact that it was not found in good faith.

6. The affidavit was required by law, and therefore, if false, under the Texas law, lays the foundation for a prosecution for perjury, but not for false swearing."

"The fifth and sixth objections require separate discussion. We are not informed of any principle by which we may inquire whether an indictment, duly found, was returned in good faith, but, whether that power exists or not, it is enough to say here that this objection does not seem to be true in fact."

"Under the Texas law the crime of false swearing, as distinguished from perjury, can only be committed by a false oath to a voluntary declaration or affidavit, 'not required by law or made in the course of a judicial proceeding.' The sixth objection asserts that the affidavit set forth in this indictment was one required by law. But this assertion is in the teeth of the allegation of the indictment, that the affidavit 'was not

then and there required by law nor made in the course of judicial proceedings.' We cannot inquire into the truth of this allegation, which may present a mixed question of law and fact."

"All the other objections are appropriate to a demurrer or a motion to quash or in arrest of judgment. They are attacks upon the indictment as a criminal pleading, the right to make which counsel expressly renounce. If well founded, they show that the indictment is bad. *But the Constitution does not require, as an indispensable prerequisite to interstate extradition, that there should be a good indictment, or even an indictment of any kind.* It requires nothing more than a charge of crime. Congress, in aid of the execution of the constitutional provision, has enacted a law (Sec. 5278, Rev. Stat.), directing that the charge shall be made either by 'an indictment found' or 'an affidavit made before a magistrate;' and, as we have seen, this court has held that such an affidavit is sufficient, saying (197 U. S. 331), 'doubtless the word 'charged' was used in its broad signification to cover any proceeding which a State might see fit to adopt, by which a formal accusation was made against an alleged criminal.' But it is obvious that an objection which, if well founded would destroy the sufficiency of the indictment, as a criminal pleading, might conceivably go far enough to destroy also its sufficiency as a charge of crime. Are then the objections made to the indictment of that nature? Let it be assumed that these are all well taken. Let it be assumed, without decision, that the false statement contained in the affidavit were statements of opinion; that the assignments of falsity were bad, because no facts necessarily inconsistent with them were alleged; that the certainty required in criminal pleading was not observed; that the time alleged antedates the indictment by more

than the period of the statute of limitations. Nevertheless, the indictment alleges that on a day named the petitioner deliberately and wilfully made, under the sanction of an oath, legally administered, a voluntary false statement and declaration in writing, to wit, the affidavit, and that the affidavit was not required by law or made in the course of a judicial proceeding. The indictment, whether good or bad, as a pleading, unmistakably describes every element of the crime of false swearing, as it is defined in the Texas Penal Code, in art. 209, which follows:

‘if any person shall deliberately and wilfully, under oath or affirmation legally administered, made a false statement by a voluntary declaration or affidavit, which is not required by law or made in the course of a judicial proceeding, he is guilty of false swearing, and shall be punished by imprisonment in the penitentiary not less than two nor more than five years.’ ”

“This court, in cases already cited, has said, somewhat vaguely but with as much precision as the subjects admits, that the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. *If more were required it would impose upon courts, in the trial of writs of habeas corpus, the duty of a critical examination of the laws of States with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the States and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and, in our opinion, there is nothing in*

the letter or the spirit of that instrument which requires or permits its performance."

Judgment affirmed.

Drew v. Thaw, 235 U. S. 432.

That Thaw having been acquitted of murder because of insanity had escaped from Matteawan. He was thereupon indicted for conspiracy with others to pervert and obstruct justice in the due administration of law, and escaped to New Hampshire. His extradition was requested.

p. 438 "In the wide range taken by the argument for the appellee it was suggested among other things that it was not a crime for a man confined in an insane asylum to walk out if he could, and that therefore a conspiracy to do it could not stand in any worse case. But that depends on the statute. It is perfectly possible and even may be rational to enact that a conspiracy to accomplish what an individual is free to do shall be a crime. An individual is free to refuse his custom to a shop, but a conspiracy to abstain from giving custom, might and in some jurisdictions probably would be punished. If the acts conspired for tend to obstruct the due administration of the laws the statute makes the conspiracy criminal whether the acts themselves are so or not. We do not regard it as open to debate that the withdrawal, by connivance, of a man from an insane asylum, to which he had been committed as Thaw was, did tend to obstruct the due administration of the law. At least, the New York courts may so decide. Therefore the indictment charges a crime. If there is any remote defect in the earlier proceedings by which Thaw was committed, which we are far from intimating, this is not the time and place for that question to be tried.

"If the conspiracy constituted a crime there is no

doubt that Thaw is a fugitive from justice. He was a party to the crime in New York and afterwards left the State. It long has been established for purposes of extradition between the States it does not matter what motive induced the departure. *Roberts v. Reilly*, 116 U. S. 80; *Appleyard v. Massachusetts*, 203 U. S. 222, 226, 227. We perceive no ground whatever for the suggestion that in a case like this there should be a stricter rule."

"The most serious argument on behalf of Thaw is that if he was insane when he contrived his escape he could not be guilty of crime, while if he was not insane he was entitled to be discharged; and that his confinement and other facts scattered through the record require us to assume that he was insane. But this is not Thaw's trial. In extradition proceedings, even when as here a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about habeas corpus in this connection, but peremptorily requires that upon proper demand the person charged shall be delivered up to be removed to the State having jurisdiction of the crime. Article 4, Sec. 2. *Pettibone v. Nichols*, 203 U. S. 192, 205. There is no discretion allowed, no inquiry into motives. *Kentucky v. Dennison*, 24 How. 66; *Pettibone v. Nichols*, 203 U. S. 192, 203. The technical sufficiency of the indictment is not open. *Munsey v. Clough*, 196 U. S. 364, 373. And even if it be true that the argument stated offers a nice question, it is a question as to the laws of New York which the New York courts must decide. The statute that declares an act done by a lunatic not a crime adds that a person is not excused from criminal liability except upon proof that at the time 'he was laboring under such defect of reason as: 1. Not to

know the nature and quality of the act he was doing; or 2. Not to know that the act was wrong.' Penal Law, Sec. 1120. See Sec. 34. The inmates of lunatic asylums are largely governed, it has been remarked, by appeal to the same motives that govern other men, and it well might be that a man who was insane and dangerous, nevertheless in many directions understood the nature and quality of his acts as well, and was as open to be affected by the motives of the criminal law as anybody else. How far such considerations shall be taken into account it is for the New York courts to decide, as it is for a New York jury to determine whether at the moment of the conspiracy Thaw was insane in such sense as they may be instructed would make the fact a defence. *Pierce v. Creecy*, 210 U. S. 387, 405; *Charlton v. Kelly*, 229 U. S. 447, 462. When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that State and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once.

Final order reversed."

Biddinger v. Commissioner of Police, 235 U. S. 128:

Biddinger was indicted in Illinois for various crimes. Extradition was granted by the Governor of New York and a writ of habeas corpus taken out. A number of errors assigned. The only important one was that Biddinger was in Illinois continuously for three years after the dates

on which he was charged with having committed the crimes and was not a fugitive, and the indictments were bad as not having been found in the statutory period. The Court quoted the Federal Constitution, Article 4, Section 2, and the U. S. revised statutes, Section 5278.

p. "The provision of the Federal Constitution quoted,
132 with the change of only two words, first appears in the Articles of Confederation of 1781, where it was used to describe and to continue in effect the practice of the New England Colonies with respect to the extradition of criminals. *Kentucky v. Dennison*, 24 How. 66. The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated States of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one State an asylum against the processes of justice of another. *Lascelles v. Georgia*, 148 U. S. 537. Such a provision was necessary to prevent the very general requirement of the state constitutions that persons accused of crime shall be tried in the county or district in which the crime shall have been committed from becoming a shield for the guilty rather than a defense for the innocent, which it was intended to be. Its design was and is, in effect, to eliminate, for this purpose, the boundaries of States, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land."

"Such being the origin and purpose of these provisions of the Constitution and statutes, they have not been construed narrowly, and technically by the courts as if they were penal laws, but liberally to effect their important purpose, with the result that one who leaves the demanding State before prosecution is anticipated or begun, or without knowledge on his part that he

has violated any law, or who, having committed a crime in one State, returns to his home in another, is nevertheless decided to be a fugitive from justice within their meaning. *Roberts v. Reilly*, 116 U. S. 80; *Appleyard v. Massachusetts*, 203 U. S. 222; *Kingsbury's Case*, 106 Massachusetts, 223."

"Courts have been free to give this meaning to the Constitution and statutes because in delivering up an accused person to the authorities of a sister State they are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the Federal Constitution but in the manner provided by the State against the laws of which it is charged that he has offended."

"The discussion of these provisions of the Constitution and statutes for now much more than a century has resulted in the formulation of this conclusion more than once announced by this court (*Appleyard v. Massachusetts*, 203 U. S., 222, 227):

" 'A person charged by indictment or by affidavit before a magistrate with the commission within a State of a crime covered by its laws, and who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. Such is the command of the Supreme law of the land, which may not be disregarded by any State.' "

p. 134 "The scope and limits of the hearing on habeas corpus in such cases has not been, perhaps it should not be, determined with precision. Doubt as to the jurisdiction of the courts to review at all the executive conclusion that the person accused is a fugitive from justice has more than once been stated in the decisions of this court, *Ex parte Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80; *Appleyard v. Massachusetts*, 203 U. S. 222; but the question not being necessary for the disposition of the cases in which it is touched upon, as it is not in this, it is left undecided. This much, however, the decisions of this court make clear; that the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding State at the time the crime is alleged to have been committed; and frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding State."

The law of the State of Pennsylvania in reference to extradition follows the decisions of the Supreme Court of the United States.

Commonwealth ex rel Flower v. Superintendent of County Prisons, 133 Superior 594.

This was an extradition requisition by the state of New York alleging that Flower was guilty of obtaining money on false pretenses. On a writ of habeas corpus Flower attempted to show that he did not know the prosecutor and had never had any dealings with him. The Court held that that was a matter of defense upon a trial

in the court of the demanding state and could not be tried in Pennsylvania. To the same effect Commonwealth ex rel. v. Superintendent of County Prisons, 220 Pa. 401; Commonwealth ex rel Burlingame v. Hare, Sheriff, 36 Superior 125.

The relator here admits that he attempted in his absence to have the indictment quashed in California. The law of Pennsylvania is that no one charged with a crime can appear and move to quash an indictment unless he is present.

Commonwealth v. Fuerstein and Stearn, 98 Superior 201.

These defendants were fugitives from justice and were indicted by bills presented to the Grand Jury by leave of court. Attempts were made to locate them without avail. One defendant, Fuerstein, who was not surrendered nor had entered bail, by counsel moved to quash bills of indictment on the ground that they were found on hearsay testimony. The lower court quashed the bills and an appeal was taken by the District Attorney to the Superior Court, the Quarter Sessions Court was reversed and the bills reinstated. The Superior Court held that it was against public policy and the proper administration of criminal law to permit one who was a fugitive not arrested or surrendered on bail to appear by counsel to attack the validity of the indictments. The Court said, page 205, "There is no right to file an appearance de bene esse in our criminal courts." Following the case of U. S. v. Taylor, 4 Cranch Circuit Court Reporter 731.

As to Point III of Petitioner's Brief, "Interstate Rendition should not be allowed to aid Political Persecution", there is no scintilla of proof.

The Indictment shows that in registering the petitioner swore that his name was Sam Darcy and that he was born in the United States, of which he admits the falsity.

The accompanying papers show many discrepancies which have been called to the court's attention under the facts:

How long was he a resident of California? In one place 8½ years, in another 5 years.

How many years a citizen? In one place 34 years, in another 13 years.

What is his right name? When he landed in the United States, he was Samuel Dardik, then he becomes Samuel Dardeck, Samuel Adams Dardeck, and Sam Darey.

We have not attempted to analyze or discuss or reply to the cases cited by the relator as to the law of California in reference to the right to be registered and vote. As we see it, those questions can all be raised upon a motion to quash when the relator is before the court or upon the trial of the indictment in California.

The outcome of that trial is of no moment to this Court.

The indictment charges the defendant with the crime of perjury. That charge is set forth in that he made false statements under oath in an affidavit required to be taken by law. The orderly administration of justice requires that, as the defendant is substantially charged with a crime, the trial of that issue must take place in the demanding state and that any defense technical or substantial which the defendant has to make to those charges must be determined in the demanding state, as they are questions which can only properly be determined under the laws of the demanding state. That to require more under a writ of habeas corpus would be imposing upon this court or any other court of the asylum state the duty of a critical examination of the laws of the demanding state with which naturally this court or any other court of an asylum state could have only a general acquaintance and would inevitably lead to errors in decisions which would result in miscarriages of justice.

As the defendant is substantially charged with a crime and as the defendant admits that he swore to facts which were untrue and that he was in the demanding state at the time he made said affidavit, the writ should be dismissed and the defendant ordered turned over to the agent for the state of California to be taken back there for trial.

Respectfully submitted,

CHARLES F. KELLEY,
District Attorney.

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